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JOSEPH J. SPANIOLO, JR.
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In The
Supreme Court of the United States

October Term, 1990

MELVIN R. KURR,

Petitioner,

vs.

VILLAGE OF BUFFALO GROVE, ET AL.,

Respondents.

Petition For Writ Of Certiorari To The
United States Court Of Appeals For The
Seventh Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Water and Sewer Agreement tendered by the Village is violative of the Petitioner's Fourth Amendment rights.
2. Whether the Seventh Circuit Court of Appeals erred in not addressing an equal protection claim not raised in the district court.
3. Whether Petitioner was afforded procedural due process of law in connection with the termination of his water and sewer service.

LIST OF ALL PARTIES TO PROCEEDING

Petitioner's List of Parties is true and accurate to the extent provided, but should also include Respondents STATE OF ILLINOIS, ILLINOIS DEPARTMENT OF PUBLIC HEALTH, and JUDITH MUNSON, staff attorney, Illinois Department of Public Health.

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REASONS FOR DENYING THE WRIT

I

STATEMENT OF CASE

The statement of case contained herein is an abridged adaptation of the facts in the District Court's Memorandum Opinion and Order. Petition for Writ of Certiorari, Appendix, pp. B-1 - B-44.

The petitioner, Mr. Kurr, owns a home in Lake County, Illinois. In 1976, Mr. Kurr entered into an oral contract with defendant Chevy Chase permitting him to connect with Chevy Chase's water and sewer mains. Mr. Kurr began paying Chevy Chase for water and sewer services in October, 1976, and continued to do so until November, 1987.

In November of 1987 the Board of Trustees for the Village of Buffalo Grove passed Resolutions 87-53 and 87-54. These resolutions obligated Chevy Chase to make certain improvements to its facilities and approved an agreement whereby Chevy Chase would transfer its water and sewer systems to the Village. These resolutions and the related agreements authorized the Village to provide water and sewer services to homeowners who had previously been serviced by Chevy Chase.

On November 3, 1987, Mr. Kurr received a letter from the Vice President of Chevy Chase notifying him that his water and sewer service would be disconnected unless he submitted a signed "Water and Sewer Agreement" to the Village. On the same day, the Village's Director of Public Works sent a letter to Mr. Kurr certifying that a copy of

the "Water and Sewer Agreement" had been placed in Mr. Kurr's mailbox.

On November 5, 1987, at 9:00 a.m., the Village disconnected Mr. Kurr's water supply. Mr. Kurr unsuccessfully complained of this action to the Village's Director of Public Works and to Mr. William Johnson, the Vice President of Chevy Chase. Shortly after the water was disconnected, the Lake County Health Department ("LCHD") attempted to convince Mr. Kurr to sign a Water and Sewer Agreement. Specifically, on November 13, 1987, defendant Ted Byers, the District Supervisor for the LCHD, notified Mr. Kurr that the LCHD would seek legal action if he did not reconnect to the Village's water supply. In response, Mr. Kurr contacted Mr. Byers and Steven Potsic, the Executive Director of the LCHD, and complained that his water and sewer service was wrongfully disconnected by the Village when it took possession of Chevy Chase.

Mr. Kurr next sought assistance from the State of Illinois to correct the allegedly wrongful actions of the Village. The Illinois Attorney General's Office, who Mr. Kurr first complained to, forwarded the complaint to the Illinois Department of Public Health (the "IDPH"). The IDPH, however, notified Mr. Kurr, on June 23, 1988, that it could not take action against the Village for denying a supply of water under these circumstances.

During this time, the LCHD and the Village persisted in their attempts to convince Mr. Kurr to sign a "Water and Sewer Agreement." Mr. Byers telephoned Mr. Kurr numerous times and warned him that the Village would dig up his sewer if he did not submit a signed agreement.

The Village's attorney, defendant Raysa, also was in contact with Mr. Kurr and informed him that Illinois law required a signed Water and Sewer Agreement before water and sewer service would be provided. Mr. Kurr replied, by registered letter, that the Village and its employees had acted unlawfully in disconnecting him from the water system. Thus, Mr. Kurr refused to sign a "Water and Sewer Agreement," and the Village Board voted in an Executive Session not to restore water service to Mr. Kurr's home.

Mr. Kurr filed a Complaint against various defendants, including Respondent Lake County Health Department and several of its directors and employees in U.S. District Court on October 25, 1988. Mr. Kurr's Complaint alleged that defendants' actions violated his rights under the United States Constitution, Art. I, Section 10 and Amendment 14; the Illinois Constitution, Art. I, Sections 2 and 16; and 42 USC Sections 1983, 1985(3) and 1986. In addition, Mr. Kurr's Complaint alleged that the Water and Sewer Agreement deprived him of property without just compensation in violation of the Fifth Amendment; violated his Fourth Amendment freedom from unreasonable searches and seizures; and deprived him of property without due process of law. In the Complaint Kurr also asserted various pendent claims under Illinois law against certain defendants. For purposes of this Petition, however, Mr. Kurr raises only issues concerning his Fourth Amendment, due process and equal protection rights.

Motions to dismiss plaintiff's Complaint were filed on behalf of all defendants pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. On May 31, 1989,

the United States District Court for the Northern District of Illinois issued a Memorandum Opinion and Order dismissing the plaintiff's Complaint for failure to state a claim upon which relief could be granted. Petition for Writ of Certiorari, Appendix, pp. B-1 - B-44. This decision was affirmed by the United States Court of Appeals for the Seventh Circuit with its Order of August 28, 1990. Respondent's appendix, p. App. 1.

II

SUMMARY OF ARGUMENT

The Fourth Amendment to the United States Constitution offers protection against unreasonable searches and seizures. This protection, however, is not absolute and does not extend to searches deemed reasonable. Accordingly, in the instant matter, Petitioner cannot be heard to complain of the Village's actions, since they are reasonable searches necessary for the operation of the water and sewer system.

The Petitioner also cannot be heard by this Court to complain of a violation of his equal protection or due process rights. The alleged equal protection violations were not raised by Petitioner as an issue in either the trial court or the Court of Appeals, and are thus not preserved for review.

Finally, Petitioner received both adequate notice and numerous opportunities for a pre-deprivation hearing so as to satisfy the due process requirements.

III ARGUMENT

A.

THE VILLAGE'S WATER AND SEWER AGREEMENT DOES NOT SUBJECT PETITIONER TO AN UNREASONABLE SEARCH OR CONSTITUTE AN UNREASONABLE SEARCH AND SEIZURE IN VIOLATION OF THE FOURTH AMENDMENT BUT INSTEAD PRESCRIBES CONSTITUTIONALLY VALID ACTIVITIES NECESSARY FOR THE OPERATION OF A WATER AND SEWER SYSTEM.

The Fourth Amendment to the United States Constitution provides that people should be "secure in their persons, house, papers and effects, against unreasonable searches and seizures . . . "

It is important to note that this constitutional provision does not proscribe all searches, but only those which are deemed unreasonable. Petitioner attempts to create a Fourth Amendment constitutional question by arguing that a "warrantless search" such as the one prescribed by the "Water and Sewer Agreement" is presumptively unreasonable, and by arguing that the lower courts' opinions are in "serious conflict with the applicable decisions of this court." Upon analysis, however, it is clear that the "searches" contemplated by the "Water and Sewer Agreement" are not unreasonable, and thus not violative of the Fourth Amendment, and that the lower courts' opinions are not in "serious conflict with the applicable decisions of this Court."

The provision of the "Water and Sewer Agreement" which Petitioner claims is violative of his Fourth Amendment rights provides as follows:

- E. Allow authorized agents of the village free access to the premises at all reasonable hours for the purpose of reading, examining, repairing or removing the Village's meters or other property, and also the applicant's lines and connections.

This provision, however, and the activities prescribed therein, are not violative of the Fourth Amendment's guarantee against *unreasonable* searches. Instead, the activities prescribed by the Agreement are necessary to the operation of a water and sewer system, and thus constitute *reasonable* "searches." These reasonable searches, as noted above, do not constitute an intrusion upon Petitioner's Fourth Amendment rights in a constitutional sense.

Petitioner, in urging his Fourth Amendment argument, also states that the lower courts' opinions are in conflict with the applicable decisions of this Court. A review of Fourth Amendment case law, however, demonstrates that this position is erroneous.

In arguing that the lower courts' opinions are in conflict with the applicable decisions of this court, Petitioner cites *Steagald v. United States*, 451 U.S. 204 (1980) and *Payton v. New York*, 445 U.S. 573 (1980), for the proposition that a warrantless search of a private residence is presumptively unreasonable. These cases, however, are factually inapposite from the situation presented here. Specifically, the issue in *Steagald* was whether an arrest warrant was adequate to protect the Fourth Amendment interests of persons not named in the warrant when their homes were searched without consent and in the absence of exigent circumstances. *Steagald*, 451

U.S. at 212. Further, the issue in *Payton* involved the warrantless arrest of a suspect in his home. These opinions in no way reflect an inconsistency with the opinions of the lower courts in the instant matter, and simply do not provide a basis for a Writ of Certiorari. As stated above, the "searches" in the case at bar were, quite simply, reasonable and necessary, if one can even classify the events herein described as "searches."

B.

THE FAILURE OF THE COURT OF APPEALS TO ADDRESS PETITIONER'S EQUAL PROTECTION CLAIM WAS WITHOUT ERROR AND DOES NOT CONSTITUTE THE BASIS FOR A WRIT OF CERTIORARI

In his Petition for Writ of Certiorari, Petitioner states that while on appeal, he "did not make the failure of the District Court to address the equal protection claim a separate question for review." By doing such, however, Petitioner has failed to preserve the equal protection issue for appellate review, and therefore cannot be heard on the issue before the United States Supreme Court, nor make it grounds for a Writ of Certiorari.

C.

PETITIONER WAS AFFORDED DUE PROCESS OF LAW IN THE TERMINATION OF HIS UTILITY SERVICE BECAUSE ADEQUATE NOTICE AND AN OPPORTUNITY TO BE HEARD WERE PROVIDED.

To demonstrate a denial of due process, one must first establish that (1) he was deprived of a constitutionally protected life, liberty, or property interest, and

(2) that he was not afforded the process due under the circumstances. *Board of Regents v. Roth*, 408 U.S. 564, 570 (1972). In his Petition for Writ of Certiorari, Mr. Kurr maintains that he was denied due process of law when the Village terminated his water and sewer service. A review of the circumstances and relevant case law, however, clearly shows that Mr. Kurr was afforded due process of law.

In determining whether the minimum requirements for "notice and a hearing" under the due process clause are satisfied, this Court balances three factors. Specifically, as set forth in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), the Court considers the following:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the governments' interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

As noted by the District Court in its Memorandum Opinion and Order, there exists both a substantial private and government interest in the case at bar which must be considered together. Mr. Kurr has a substantial interest in continued water and sewer service to his home, and the Village has a significant interest in the manner by which it operates and controls the water and sewer service of its residents. Since there are both substantial private and government interests, the focal point of the analysis herein must be the process afforded Mr. Kurr.

Mr. Kurr was afforded process which adequately notified him of the Village's intention to disconnect his water and sanitation services, and he was presented with a meaningful opportunity to present objections at a pre-deprivation hearing. See *Birdsell v. Board of Fire and Police Commissioners*, 854 F.2d 204 (7th Cir. 1988), quoting *Wolf v. McDonnell*, 418 U.S. 539, 577-78 (1974). Concerning a pre-deprivation hearing, Mr. Kurr had numerous attempts to voice his objections. First, on January 27, 1989, almost ten full months before his utility services were disconnected, Mr. Kurr attended an "informational meeting" concerning the intended transfer of Chevy Chase assets to the Village. At this meeting, Mr. Kurr noted his objection that the "Water and Sewer Agreement" was illegal and stated that he would not sign it. Next, the Village's Director of Public Works, Mr. Boysen, twice offered to discuss with Mr. Kurr his concerns about the "Water and Sewer Agreement." Thus, in accordance with his due process rights, Mr. Kurr was presented with numerous opportunities to voice his objections prior to his water and sewer services being disconnected.

Mr. Kurr was also afforded adequate notice to protect his due process rights. As noted by the District Court, Petitioner received numerous communications, both by telephone or through the mail, regarding the impending proposed actions of the Village. Petition for Writ of Certiorari, App. p. B-23. These communications provided more than adequate notice to the petitioner and sufficiently guaranteed protection of his due process rights. Thus, the Petition for Writ of Certiorari should be denied.

CONCLUSION

Contrary to the arguments of Petitioner, neither his Fourth Amendment nor due process rights were violated when his water and sewer service were disconnected. Further, the Petitioner, despite liberal rules afforded pro se litigants, is precluded from raising equal protection issues before this Court when he failed to do so in the lower courts. For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully Submitted,

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App. 1

APPENDIX

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

Submitted August 21, 1990*

August 28, 1990

Before

Hon. William J. Bauer, Chief Judge

Hon. Frank H. Easterbrook, Circuit Judge

Hon. Wilbur F. Pell, Senior Circuit Judge

MELVIN R. KURR,)	Appeal from the United
Plaintiff-Appellant,)	States District Court for
No. 89-2321)	the Northern District of
vs.)	Illinois, Eastern Division.
VILLAGE OF BUFFALO)	No. 88 C 9051
GROVE, et al.,)	James F. Holderman,
Defendants-Appellees.)	Judge.

ORDER

Plaintiff-Appellant, Melvin R. Kurr, appeals from the district court's decision dismissing his cause of action and entering judgment in favor of the defendants. After reviewing the decision of the district court, the briefs,

* After preliminary examination of the briefs, the court notified the parties that it had tentatively concluded that oral argument would not be helpful to the court in this case. The notice provided that any party might file a "Statement as to Need of Oral Argument." See Fed. R. App. P. 34(a); Circuit Rule 34(f). Plaintiff-Appellant has filed such a statement and requested oral argument. Upon consideration of that statement, the briefs, and the record, the request for oral argument is denied and the appeal is submitted on the briefs and record.

and the record, we have determined that it properly identified and resolved the issues before us on appeal; therefore, we affirm the decision of the district court for the reasons stated in the attached memorandum opinion.

On appeal, the Village of Buffalo Grove seeks fees and costs pursuant to 42 U.S.C. § 1988 and under Rule 11 of the Federal Rules of Civil Procedure, arguing that the appeal was frivolous. Rule 11 is an inappropriate vehicle for obtaining sanctions in this court; however, Rule 38 of the Federal Rules of Appellate Procedure does provide for the imposition of damages and costs for taking a frivolous appeal. Therefore, we will analyze the request for fees and costs under § 1988 and Rule 38.

In this case, the district court provided the appellant with a twenty-five page detailed analysis of why his allegations failed to state a claim under Rule 12(b) (6) of the Federal Rules of Civil Procedure. In *Hughes v. Rowe*, 449 U.S. 5, 101 S. Ct. 173 (1980), the Supreme Court noted that a plaintiff in a civil rights action under § 1983 " 'should not be assessed his opponent's attorney's fees unless a court finds that his claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so.' " *Id.* at 15, 101 S. Ct. at 178-79 (quoting *Christiansburg Garment Co. v. Equal Employment Opportunity Comm'n*, 434 U.S. 412, 422, 98 S. Ct. 694, 701 (1978)). In deciding to file an appeal after the district court's detailed and comprehensive disposition, Kurr elected to continue to litigate after his claim had clearly become frivolous; therefore, we impose sanctions pursuant to § 1988 and Rule 38 of the Federal Rules of Appellate Procedure. The Village is ordered to file within fourteen days a statement of the costs and attorney's fees it has incurred in litigating this appeal.
